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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 27

DAVID E. KENEY, *Petitioner,*

v.

PEOPLE OF THE STATE OF NEW YORK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF THE COUNTY OF MONROE, NEW YORK

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December 29, 1964

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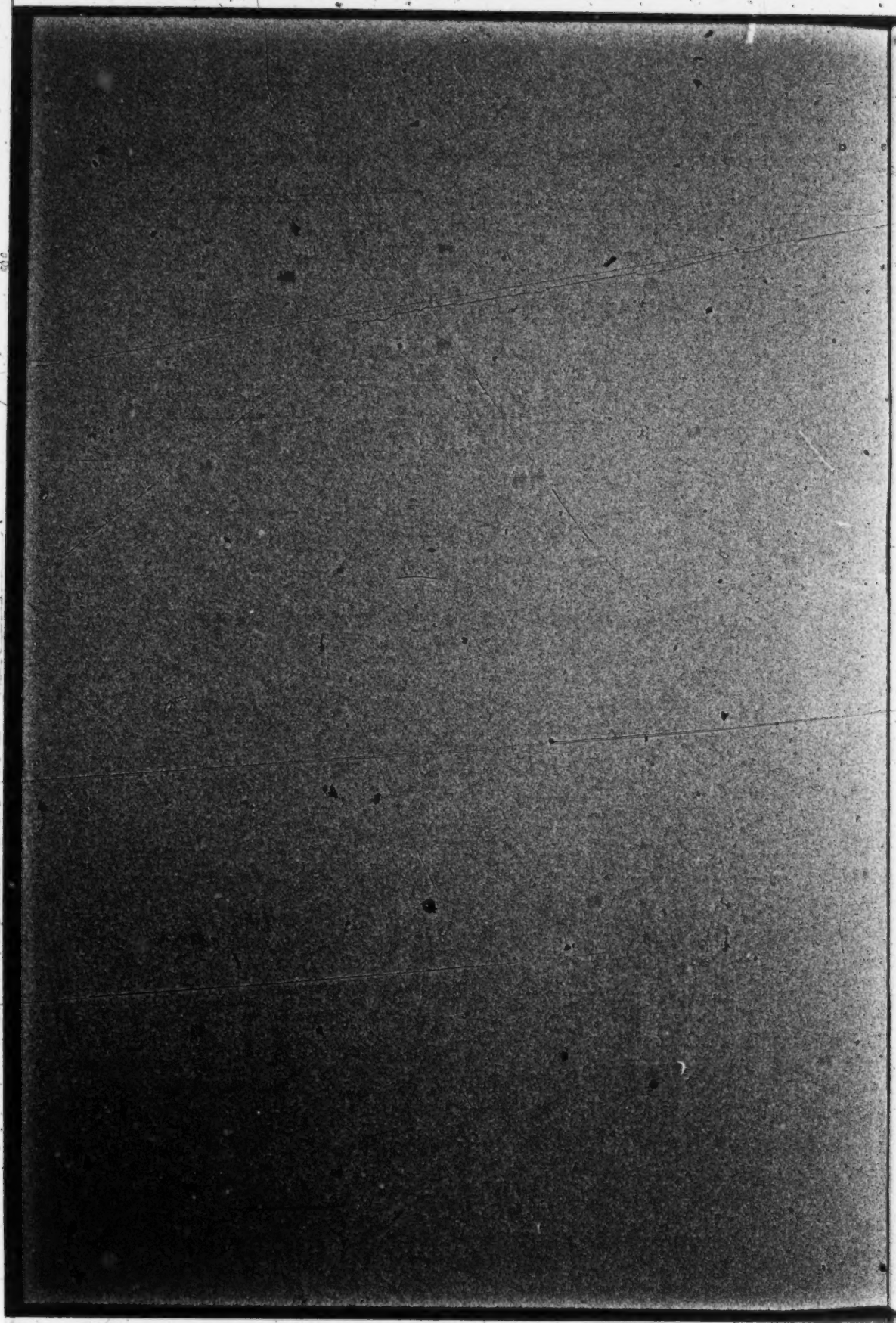

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Lockhart and McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 (1954) 14
Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960) 14, 17, 21

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Petitioner, David E. Keney, prays that a writ of certiorari issue to review the judgment of the County Court of the County of Monroe, New York, rendered in the above-entitled proceeding on May 20, 1964.

OPINIONS BELOW

The trial of petitioner took place in the City Court, Criminal Branch, of Rochester, New York, before a jury. No opinion was rendered by the trial judge.

The conviction was affirmed by the County Court of the County of Monroe, New York. The opinion

rendered by County Judge George D. Ogden, dated May 20, 1964, is unreported. It is reprinted as Appendix A hereto, p. 1a, *infra*.

The Court of Appeals of New York denied application for leave to appeal but rendered no opinion.

JURISDICTION

The petitioner was tried and convicted for having violated § 1141 of the New York Penal Law. The trial took place on October 16, 1963, in the City Court, Criminal Branch, of Rochester, New York. The conviction was affirmed on May 20, 1964, by the County Court of the County of Monroe, New York. A timely application for leave to appeal to the Court of Appeals of New York was denied on June 22, 1964. A timely application for reargument of the request for leave to appeal was denied on August 3, 1964.

On October 15, 1964, Mr. Justice Harlan signed an order extending the time for filing this petition to and including December 30, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a state court conviction of a bookseller for having sold obscene books can be sustained under the Fourteenth Amendment where the jury is charged that the obscenity of the books is to be determined solely by the appeal of the questioned material "to those who may be sex perverted."

2. Whether a state court conviction of a bookseller for having sold obscene books can be sustained under the Fourteenth Amendment where the jury is charged

that the necessary scienter may be found solely by inference drawn from the titles, the covers and the contents of the books, the bookseller concededly not having read the books or been advised of their obscene nature.

3. Whether the "contemporary community standards" by which obscenity is to be determined under the Fourteenth Amendment are those of the particular local community where the case arises or those of the Nation as a whole, and whether the jury may be charged with the duty of determining what the relevant community standards should be.

4. Whether punishable obscenity under the First and Fourteenth Amendment is limited to "hard-core pornography", and whether the paperback books here involved are of that category or may otherwise be considered obscene under any definition permitted by the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Constitution of the United States, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

New York Penal Law, Section 1141:

> **§ 1141. Obscene Prints and Articles**
>
> 1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell,

lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, * * * or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book * * * drawing, photograph motion picture film, figure, image, * * *

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred fifty dollars nor more than two thousand dollars or both fine and imprisonment for the first offense; for a second offense, shall be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

* * *

(As amended L.1950, c. 623, §§ 1-3; L.1950, c. 624; L.1954, c. 703; L.1955, c. 837; L.1956, cc. 423, 661, 662, 681; L.1957, c. 690; L.1958, cc. 735, 736, eff. July 1, 1958, L.1958, c. 737, §§ 1, 2, eff. July 1, 1958. * * *)

STATEMENT OF THE CASE

About 8:00 p.m. on the 25th day of April, 1963, two female police officers entered petitioner's place of business, a small magazine store at 326 Court Street in the City of Rochester, New York, and observed the petitioner on the premises. The police officers purchased three novels entitled "Lust School", "Lust Web" and "Sin Servant", each of which sold for seventy-five cents. The books purchased were part of a shipment

of one hundred books which had arrived less than forty-eight hours before the police officers purchased them Tuesday, April 23, 1963 (R. 85).*

The petitioner testified, without contradiction, that he had no knowledge of the contents of these books. He stated that he put the books out for sale without reading or knowing anything about them (R. 85-86). Petitioner had never heard of any of the titles of these books before; did not order them by name; and had never discussed their contents with anybody nor had anybody else disclosed to him the nature of their contents (R. 88).

A synopsis of each of the books mentioned above is contained in the Appendix B of this Petition, pp. 2a-4a, *infra*. The story in each of the books at bar is concluded with righteousness prevailing. All the stories are uniform in that the central character, who becomes morally delinquent, discovers his error and ultimately reforms. All three of the novels possess a plot, a theme, a happy conclusion and also possess some literary merit. They uniformly omit any and all terms descriptive of the genital areas of the anatomy and avoid any four-letter words commonly found in some of our best sellers. They avoid any *explicit* descriptions or representations of normal or abnormal sex acts. Throughout all three of the novels there are numerous descriptions of sexual encounters between the various characters but these descriptions are handled tastefully and neither in language nor in theme do the books contain the candor of discussion or explicitness of language that is found paramount in some of the writings and best sellers gen-

* All references are to the pages of the original transcript certified in the record on appeal.

erally accepted and widely read by the American public.

Each of the three books contains 190 pages. The district attorney read to the jury isolated passages from each of the three novels, to wit: from "Sin Servant" (People's Exhibit 1) *three pages* (i.e., pp. 97, 98 and 99 of Chapter 8) (R. 59-63); from "Lust Web" (People's Exhibit 2) *approximately six pages* (i.e., pp. 53-59) (R. 38-46); and from "Lust School" (People's Exhibit 3) *eight pages* (i.e., pp. 101-108) (R. 48-59).

On several different occasions defense counsel unsuccessfully objected to the reading of isolated excerpts from each of the books to the jury (R. 19, 47). The three books taken as a whole contain 570 pages and during the course of the trial no more of each of the books was read to the jury than 17 pages described above. But the judge did allow the jury to take the three books into the jury room "for your complete perusal" (R. 110).

The jury retired at 12:05 p.m. and returned with its verdict 42 minutes later, finding all three novels obscene and the petitioner guilty of their sale in violation of § 1141 of the New York Penal Law (R. 121). Petitioner was then fined $500 and sentenced to four months in the Monroe County Penitentiary.

Among the charges to the jury, to which appropriate exceptions were taken, were the following:

(1) That petitioner's knowledge or scienter could be inferred "from the titles of books, from the covers of the books, and from what appears in the books, any of you can take those into consideration . . . . And if it is a matter of knowledge, which is to be understood

whether or not knowledge is an integral part of this matter, you can draw inferences, if you can draw it, from all the factual matters here even as to the books, names and to the covers, and as sold by this defendant." R. 112-113.

(2) That "Obscene material is material which deals with sex in a manner appealing to the prurient interests of individuals, that is, those who may be sex perverted, who reading such novels or books, are urged on by that prurient desire to urge them, or egg them on to the commission of avid acts in the community" and that the "predominant appeal for you to be looking for in this evidence and the books is to see whether . . . the work has no other purpose except to insight and excite the interests of individuals who are already perverted to future acts of perversion . . . ." R. 108-109.

(3) That "it is in your conscience in this community—the conscience of you individual jurors—and is a persistent shock treatment, that which could be contained in the books. Those are the things for you to determine from your examination of all the evidence and from the examination of the books, themselves. And you will also, in your determination, determine upon the contemporary community standards. You have relatives and your associates in everyday life in this community, and you know whether they meet with the definition of obscenity under the predominate appeals. I say that those morbid individuals are egged on by this type of thing. And the test of course is the community standards of sex and the treatment of sex in the manner in which sex should be treated, and not as an obscenity. Those are the things the jury will have to determine, in particular, the standards in which

you feel this community is entitled to with relation to your determination as to the guilt or innocence of the defendant." R. 109-110.

Upon the appeal to the County Court of the County of Monroe, New York, the conviction was affirmed. Judge Ogden wrote that "there is ample evidence to sustain the conviction, and the instructions to the jury given by the Judge presiding at the trial fairly state the applicable law, when considered in their entirety." He added, quoting from *People* v. *Fritch,* 13 N.Y. 2d 119 at 124, 128, that the three paperbacks in question were "hard-core pornography" and "dirt for dirt's sake, and dirt for money's sake"; the books had "no discernible purpose, no development of any theme or idea except plain, old-fashioned filth." The decision in *Roth* v. *United States,* 354 U.S. 476, 490, was among the cases cited by the court in support of these conclusions.

RAISING THE FEDERAL QUESTIONS

In the course of the trial, counsel raised the questions pertaining to the federal constitutional standards to be applied in judging whether a book is obscene (R. 120). The court's misconstruction of the average person test was duly challenged in his exceptions to the charge (R. 114, 116). The constitutional issue of scienter was also raised in the course of counsel's request to charge and exceptions to the court's instructions to the jury (R. 119, 120). Trial counsel preserved for appeal the constitutional question of the proper standard of contemporary community standards by excepting to the court's erroneous charge that the community should be the local community and the standards should be that which the jury felt the community was entitled to (R. 116).

Each of these federal constitutional issues was raised in appellant's brief in the Monroe County Court, to wit: The propriety of the court's charge on the average person, at pages 5 through 8; the constitutional deficiency of the court's charge on scienter, pages 13 through 16; and the court's misconstruction of contemporary community standards, at pages 8 through 10. (Appellant's brief, Monroe County Court).

The additional issue of the constitutional test of hard-core pornography was raised by appellant for the first time in Monroe County Court, at pages 11 through 13 and pages 17 through 30 (Appellant's brief, Monroe County Court).

Each of these federal constitutional issues set forth above was again raised in an application for leave to appeal to the New York Court of Appeals and in the application for leave to re-argue leave to appeal to the New York Court of Appeals and therefore the page references set forth above are exactly the same.

In the Order of the Chief Justice of the New York Court of Appeals, Charles S. Desmond, denying leave to appeal to the New York Court of Appeals, it was stated that the issues as to violations of the United States Constitution, Fourteenth Amendment, i.e., that Section 1141 of the New York Penal Law, as applied and construed, was repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, were raised in defendant-appellant's brief. It was also stated that the petitioner had charged that by the judgment below he had been deprived of due process under the Fourteenth Amendment, as set forth more fully in his brief. Denial of leave to appeal was thus premised on consideration and rejection of these constitutional claims.

REASONS FOR GRANTING THE WRIT

1. The Decision Below That Obscenity is to be Determined by the Appeal of the Material to Those Who Are "Sex Perverted" is in Direct Conflict With the Rulings of This Court and With the Sixth Circuit's Decision in Volanski v. United States, 246 F. 2d 842

This Court, in *Roth* v. *United States,* 354 U.S. 476, 489, expressly rejected the *Hicklin* standard of obscenity whereby the material in question is judged merely by the effect of an isolated excerpt upon "particularly susceptible persons." *Regina* v. *Hicklin,* [1868] L.R. 3 Q.B. 360. The standard adopted was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Again rejecting the "particularly susceptible persons" test, the Court in *Butler* v. *Michigan,* 352 U.S. 380, outlawed a statute applied so as to proscribe the sale of a book considered to be obscene only as to juveniles. And in *Manual Enterprises* v. *Day,* 370 U.S. 478, the prevailing opinion, while declining to resolve the issue whether certain magazines could be considered obscene in terms of their impact on the "average homosexual" rather than on the "average person," reiterated the *Roth* rejection of the "isolated excerpt" and "particularly susceptible persons" tests. 370 U.S. at 487.

By any test approved by this Court, the standard followed by the court below cannot be sustained. In his charge to the jury, the trial judge directed that obscenity be determined by the appeal of the books "to the prurient interest of individuals, that is, those who may be sex perverted, who reading such novels or books, are urged on by that prurient desire to urge them, or egg them on to the commission of avid acts in the community." R. 108. The judge reiterated

that, to be obscene, "the work has no other purpose except to insight and excite the interests of individuals who are already perverted to future acts of perversion." R. 109. And in overruling objections to this charge, the judge repeated that it was up to the jury to find from the evidence that the books "do excite the young and the perverted." R. 115.

The affirmance of the trial judge's charge constitutes a reversion to the "particularly susceptible persons" standard rejected by *Roth*. As such, the decision below directly conflicts with the ruling of the Sixth Circuit in *Volanski* v. *United States*, 246 F. 2d 842 (C.A. 6). In that case, involving a federal court conviction for having received from an express company a shipment of obscene photographs, the trial judge had grounded his determination of guilt largely upon a psychiatrist's testimony that the pictures would have an undesirable effect upon sadists, masochists and other types of sexual deviates, as well as upon juveniles. The conviction was reversed, Mr. Justice Stewart (then a Circuit Judge) writing the opinion. The court there ruled (p. 844):

> "The admission of this evidence was prejudicial error. Obscenity is not to be measured by the reactions of any particular class or group of the population, but by the standard of the community as a whole. Perhaps the best known American decision in this field is United States v. One Book Entitled 'Ulysses,' 2 Cir., 1934, 72 F. 2d 705, affirming D.C.S.D.N.Y., 1933, 5 F. Supp. 182. District Judge Woolsey's opinion in that case admirably states the correct test of obscenity. What must be measured is 'its effect on a person with average sex instincts—what the French would call *l' homme moyen sensual*—who plays, in this branch of legal inquiry, the same role of hypothetical re-

> agent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.' 5 F. Supp. 184. 'It is only with the normal person that the law is concerned.' 5 F. Supp. 185.
>
> * * * * *
>
> "The danger of a standard that would measure what is obscene by its effect upon abnormal people is illustrated by the testimony of the psychiatrist in the present case. He testified that some people 'gain particular stimuli' by looking at the female foot, and that others, 'may get aroused sexual desires' by seeing an article of women's clothing in the window of a department store."

There is a complete parallel between the tests used by the trial judges in the *Volanski* case and the instant one: testing the prurient appeal to sadists, masochists and other types of sexual deviants, as was done in *Volanski,* is the same as testing the prurient appeal of the material in the instant case to "those who may be sex perverted." And the result reached below cannot be squared with the result reached by the Sixth Circuit in *Volanski.*

Literally applied, judging the alleged obscenity of a book by its appeal to "those who may be sex perverted" would soon reduce much of our literature to the level of that which escapes the supposed interest of the salacious few. While it may be difficult to define with precision the sex instincts of the "average" or "normal" person, to whom a prurient appeal may be decisive for obscenity purposes, testing the appeal of a book sold openly and generally to the public by the assumed interests of an undefined group of sex perverts becomes an impossible task for any jury or judge. Such a test is particularly meaningless where, as here,

no evidence is available as to the likely impact of the books on those who could accurately be described as "sex perverts."

The clear conflict with the relevant decisions of this Court and with the Sixth Circuit's *Volanski* decision, as well as the desirability of further refining the rejection of the "particularly susceptible persons" test, makes appropriate the grant of certiorari.

2. The Decision Below Raises Significant Questions as to the Degree of Scienter Requisite to a Constitutionally Permissible Prosecution of a Bookseller for Selling Obscene Books

In *Smith* v. *California*, 361 U.S. 147, this Court ruled that a State cannot constitutionally eliminate "all mental elements from the crime" of possessing or selling obscene books. But is was deemed unnecessary in *Smith* to determine "what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock." 361 U.S. at 154. Explicitly left open were (1) the circumstances under which a State could require a bookseller to investigate further or place on him the burden of explaining why he did not do so, and (2) the consequences of an honest mistake on the bookseller's part as to whether the known contents of a book constituted obscenity.

This case directly presents significant aspects of the first area left open by the *Smith* decision. The uncontradicted evidence showed that petitioner was totally unaware of the contents of the three books in question, they having been received but 48 hours earlier as part of a shipment of 100 books. He had not ordered these books by title. And he was under no obligation, by virtue of New York law, to investigate

or read the books which he offered for sale. In the light of such evidence and over the objection of counsel, the trial judge charged the jury that it could draw an inference of knowledge of obscenity merely from "the titles of books, from the covers of the books, and from what appears in the books." R. 112.

The constitutional requirement of scienter should be grounded on something more substantial than an inference drawn from a lurid title or a lurid cover drawing. Knowledge of obscene contents cannot be shown beyond a reasonable doubt, or even prima facie, by reference to that which merely "gives the leer that promises the customer some obscene [material]." *Manual Enterprises* v. *Day*, 370 U.S. 478, 491; and see *United States* v. *Hornick*, 229 F. 2d 120, 121 (C.A. 2); *Poss* v. *Christenberry*, 179 F. Supp. 411, 415 (S.D. N.Y.). It is common practice for publishers and others to "employ provocative jackets and blurbs to attract attention of prospective buyers and readers." Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 302-303 (1954); see also Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 66 (1960). Titles and covers, in other words, have no necessarily meaningful relationship with the contents of books. An innocuous title may mask a most pornographic work, while a highly provocative title may be given to an unobjectionable text.

Moreover, to permit an inference of scienter to be drawn from the contents of a book that is concededly unread by the bookseller is to place on him the perilous burdens of reading all the books he carries in stock, or explaining why he did not—which is precisely one

of the problems left open by the *Smith* decision. To require that a bookseller read all the books in stock or explain his failure to do so, at the peril of criminal prosecution for knowingly selling an obscene book, would in the words of the *Smith* decision, 361 U.S. at 154-155, "induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." And it may be questioned whether a bookseller, even if he reads the books, is really qualified to make a sound prediction as to how any court, and particularly the courts in his community, will view the obscenity problem as to any given book. That may be too great a risk to put on any bookseller.

The appropriateness of a grant of certiorari in this case to explore further the scienter problems raised by the *Smith* decision would appear both obvious and compelling.

3. The Decision Below Raises Anew the Unresolved Constitutional Question Whether the "Contemporary Community Standards" By Which Obscenity is to be Determined Are Those of a Particular Local Community or of the Nation as a Whole

The trial judge's charge to the jury in this case made it plain that the jury was to determine the obscenity of the three books in issue in accordance with the contemporary community standards of Rochester, New York. In the words of that charge:

> "The predominant appeal for you to be looking for in this evidence and the books is to see whether or not it is shameful, whether it is morbid in nudity, of sex, or forcing of that issue . . . . and that it is in your conscience in this community—the conscience of you individual jurors—and is a

persistent shock treatment, that which could be contained in the books. Those are the things for you to determine from your examination of all the evidence and from the examination of the books, themselves. And you will also, in your determination, determine based upon the contemporary community standards. You have relatives and your associates in everyday life in this community, and you know whether they meet with the definition of obscenity under the predominate appeals. I say that those morbid individuals are egged on by this type of thing. And the test of course is the community standards of sex and the treatment of sex in the manner in which sex should be treated, and not as an obscenity. Those are the things the jury will have to determine, *in particular, the standards in which you feel this community is entitled to* with relation to your determination as to the guilt or innocence of the defendant." R. 108-110 (emphasis added).

Last term, in *Jacobellis* v. *Ohio*, 378 U.S. 184, various opinions were rendered which dealt directly with the issue of whether the "contemporary community standards" referred to in the *Roth* decision as the basis for resolving the obscenity question are the standards of a given local community from which the case arises. The opinion of Mr. Justice Brennan expressed the view that the relevant community is that of the Nation, or society at large—a view which Mr. Justice Harlan had shared in his opinion in *Manual Enterprises* v. *Day*, 370 U.S. at 488. The Chief Justice, on the other hand, wrote that the standard must be that of the individual community, even though this approach "may well result in material being proscribed as obscene in one community but not in another." 378 U.S. at 200. But no definitive resolution of the issue was made by the Court.

This case presents the issue again, the jury having been enjoined to decide the question of obscenity on the basis of the contemporary standards of "this community." The community thus referred to was the place of the trial, Rochester, N. Y., with particular reference to "your relatives" and "your associates" therein. As witnessed by the division of opinion in *Jacobellis*, this issue needs further consideration and ultimate resolution for the benefit of the many courts and juries being called upon to grapple with obscenity problems. See, e.g., *Excellent Publications, Inc.* v. *United States*, 309 F. 2d 362, 365 (C.A. 1), adopting "for future guidance" a "national" community standard.

The issue as to the relevant community is compounded in this case by the charge to the jury that it was to determine "the standards in which you feel this community is entitled to." In other words, the jury was given the task of formulating its own concept of what Rochester was entitled to expect in the way of community standards. This would seem to be a misreading of the contemporary community standard from any standpoint, local or national. A jury or judge should *reflect* rather than *create* the applicable community standard.

Moreover, this charge as to community standards was made in the setting of a direction to the jury to determine the obscenity of the questioned books by their appeal to the "sex perverted." In sum, the jury was instructed to determine, in accordance with what it felt Rochester was entitled to expect regarding standards of judgment, whether an appeal had been made in these books to "those who may be sex perverted." This combination of charges provides a concrete example of the suggestion made by Lockhart and McClure, *supra*, 45 Minn. L. Rev. at 114, that when this Court in *Roth* used the phrase "contemporary com-

munity standards" it was merely using a positive form of phraseology to express its disapproval of the Victorian standards embodied in the *Hicklin* test—especially the standard of judging the appeal made to "particularly susceptible persons." Community standards, whether in Rochester or elsewhere, should be divorced from the standards set by those unfortunate groups who little understand them or appreciate their value. What Rochester and the Nation are entitled to expect is a judgment and a standard related in some fashion to the normal or average sex instincts of those in the relevant community.

To clarify the scope and meaning of the "contemporary community standards" principle in the above-described context, review of the judgment below becomes highly appropriate.

4. The Decision Below, Holding the Books in Question to be "Hard-Core Pornography", Raises Important Constitutional Questions as to the Proper Test of the Kind of Literature That May Be Proscribed as Obscene

In affirming petitioner's conviction, the Monroe County Court stated that the books in question were obscene as being "hard-core pornography"—or "dirt for dirt's sake, and dirt for money's sake" with "no discernible artistic purpose, no development of any theme or idea except plain, old-fashioned filth."

Thus held obscene were three books of precisely the same type and nature as the books before this Court last term in *A Quantity of Books* v. *Kansas*, 378 U.S. 205. Seven books were involved in the *Kansas* case, seven books the nature of which was portrayed in footnote 1 of Mr. Justice Harlan's dissenting opinion, 378 U.S. at 215-217. The three books in the instant

case—"Sin Servant", "Lust School" and "Lust Web"—are but additional titles in this seemingly endless series. All of them are nationally distributed paperbacks, published in quantities ranging from 100,000 to 1,000,000, and all of them are publicly and openly displayed on numerous newstands. They are distributed to approximately 800 local and regional distributors throughout the 50 States.

The majority of this Court in the *Kansas* case, however, made a resolution on procedural grounds without reaching or deciding the contention that the lower courts had erred in holding the novels in question obscene. 378 U.S. at 208. But Mr. Justice Stewart, concurring, categorically stated that in his opinion "the books here involved were not hard-core pornography" and that "Kansas could not by any procedure constitutionally suppress them." 378 U.S. at 214. On the other hand, Mr. Justice Harlan, joined by Mr. Justice Clark, felt that "these so-called 'novels' have 'been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner' and that the State's criteria for judging their obscenity are rational." 378 U.S. at 215.

The difference of opinion within this Court, together with the absence of a majority ruling on the matter, makes it appropriate to review the judgment below to determine if this type of widely and publicly distributed paperback can be constitutionally considered "hard-core pronography" or can be constitutionally outlawed by a State. The three novels in question obviously represent part of the large reservoir of reading material consumed by the American public; they are not sold "under the counter" or surreptitiously.

While concededly possessing no substantial literary merit and concentrating on sex, these books contain no four-letter words or any foul or vile language. Nor do they engage in precise anatomical descriptions. They contain plots and themes, as indicated in the synopses in Appendix B hereto, pp. 2a-4a, *infra*. Each has a moral lesson. Labeled by many as "trash", these books will never take a place among the world's great literature. Like many of their countless predecessors, they will in a short time, if they have not already done so, fall into the deep cavern of obscurity.

Viewed in the light of what appears to be the contemporary national standards, these books would not seem to involve "hard-core pornography." They are far above any of the true pornography submitted to this Court in the *Roth* case. Compared with such plotness works as "Tropic of Cancer" and with such anatomically candid descriptions as contained in "Candy", "Lady Chatterley's Lover", and "Fanny Hill", the stories contained in these books are virtually pale. See *Grove Press, Inc.* v. *Christenberry*, 276 F. 2d 433, 437-438 (C.A. 2).

A book should not be considered "hard-core pornography" merely because it deals substantially with sex. Nor should it be deemed obscene because it is not in "good taste", or because it does not have "educational value", or because it is not "refined", or because it has no "enduring value", or because it is thought to be "trash". *Hannegan* v. *Esquire*, 327 U.S. 146. As was once said by this Court, *Winters* v. *New York*, 333 U.S. 507, 510, "what is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." In short, the most skillful or artis-

tic of writers hold no special franchise to the First Amendment's freedom of expression.

Hard-core pornography, as Mr. Justice Stewart noted in his concurrence in *Jacobellis*, 378 U.S. at 197, may well be "indefinable." But most people know it when they see it. It is rarely if ever sold openly; its "black-market" nature is notorious. See Lockhart and McClure, *supra*, 45 Minn. L. Rev. at 60-66. There is nothing subtle or artistic about it. Its crude insult to sex and to the human mind is so complete and obvious that an argumentative defense of its sale or distribution is impossible.

But if, as Mr. Justice Stewart stated in *Jacobellis, supra*, "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography," the novels in question cannot be criminally outlawed. Mr. Justice Stewart's conclusion in the *Kansas* case that the type of paperback here involved is not "hard-core pornography" reflects the only rational judgment that can be drawn in this case. The books simply do not fall into the ugly category of degraded material which alone can be described as pornographic.

To permit the criminal exile of these books would jeopardize a large mass of both good and bad literature —described by some as "trashy"—to which the American public should have access, if they so desire. The ultimate danger for a free people, if this criminal conviction stands, lies not so much in the elimination of these three paperbacks from the Rochester market as in the resulting censorship of other works thought by other juries or judges to be "trash." And the fear instilled in writers can stay the pen from inscribing words that may be of some value or purpose in society.

As was said in the *Roth* case by Mr. Justice Brennan, 354 U.S. at 488, "The door barring federal and state intrusion into this area cannot be left ajar; it must be tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

The books sold by petitioner may in the eyes of most people lack taste and artistry. But the right of free expression, which petitioner's actions reflect, is shared by all men and must not perish.

In order that it may authoritatively be determined whether prosecutions in this area are limited to the sale of "hard-core pornography" and whether the type of book here involved comes within that category or within any other definition of obscenity permitted by the Constitution, the judgment below should be reviewed.

CONCLUSION

For these various reasons, this petition for a writ of certiorari to review the judgment of the Monroe County Court should be granted.

Respectfully submitted,

HERALD P. FAHRINGER, JR.
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EUGENE GRESSMAN
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Counsel for Petitioner

December 29, 1964.

APPENDIX A

STATE OF NEW YORK
COUNTY COURT, COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

v.

DAVID E. KENEY, *Defendant-Appellant.*

Appeal from judgment of City Court, Criminal Branch, City of Rochester (Davidson, J. and a Jury), convicting defendant of a violation of Section 1141, Subd. 1, of the Penal Law of the State of New York (selling obscene literature), which judgment was entered in the office of the Clerk of said Court on or about October 24, 1963.

APPEARANCES:

For Appellant: William L. Clay, Esq. (Leonard A. Snyder, Esq., of Counsel), and Lipsitz, Green and Fahringer, Esqs. (Herald P. Fahringer, Jr., Esq., of Counsel);

For The People: Hon. John C. Little, Jr., District Attorney of Monroe County (William G. Servis, Esq., of Counsel).

Decision

OGDEN, J. Defendant-appellant has been convicted of selling obscene literature, in violation of Section 1141, Subd. 1, of the Penal Law of the State of New York, and appeals to this Court. There is ample evidence to sustain the conviction, and the instructions to the jury given by the Judge presiding at the trial fairly state the applicable law, when considered in their entirety.

There were received in evidence three exhibits, being the books sold by defendant, entitled: "Sin Servant," "Lust School," and "Lust Web."

The books are "'hard-core pornography,' dirt for dirt's sake, and dirt for money's sake." (*People* v. *Fritch*, 13 N Y 2d 119, at p. 124.)

"* * * Here there is no discernible artistic purpose, no development of any theme or idea except plain, old-fashioned filth." (*People* v. *Fritch* (supra) at p. 128.)

(See, also: *In re Trans-Lux Distributing Corp.* v. *Board of Regents of the University of the State of New York*, 14 N Y 2d 88; *Roth* v. *United States*, 354 U. S. 476, 490; *People* v. *Richmond County News, Inc.*, 9 N Y 2d 578; *Brown* v. *Kingsley Books, Inc., et al.*, 1 N Y 2d 177; and *People* v. *Finkelstein*, 9 N Y 2d 342.)

The judgment of conviction is affirmed.

Submit order.

Dated: May 20, 1964.

/s/ Geo. D. Ogden
Monroe County Judge

APPENDIX B

"LUST SCHOOL"

By Tony Calvano

"Lust School" is a novel about St. Clair High School in the State of Wisconsin and the lost generation of young people who are becoming the excess baggage of our modern society. It describes their sexual indulgences and their frantic attempt to achieve recognition by doing that which is startling and bizarre.

The story commences with a young girl who surrenders her virginity to a fellow student and thus becomes pregnant with his child. The novel describes her distress at trying

to keep her pregnancy a secret from her family and finally her tragic decision to submit to an abortion. The arrangements for an abortion are made by an unscrupulous teacher Neill Porter, who in exchange for this service requires that the young girl submit to him whenever he desires her. The operation is a success and she fulfills her obligation to the school teacher. This young girl is abducted by a female teacher who is in love with Neill Porter and who requires her to commit an act of sodomy upon her and then attempts to murder her by shooting her several times with a revolver. Page Mallory, another teacher at the same school, rescues the young girl and notifies the police of the nefarious dealings of the other members of the faculty. The story ends with the young girl and Page Mallory marrying one another and moving to another community and living happily ever after.

"LUST WEB"

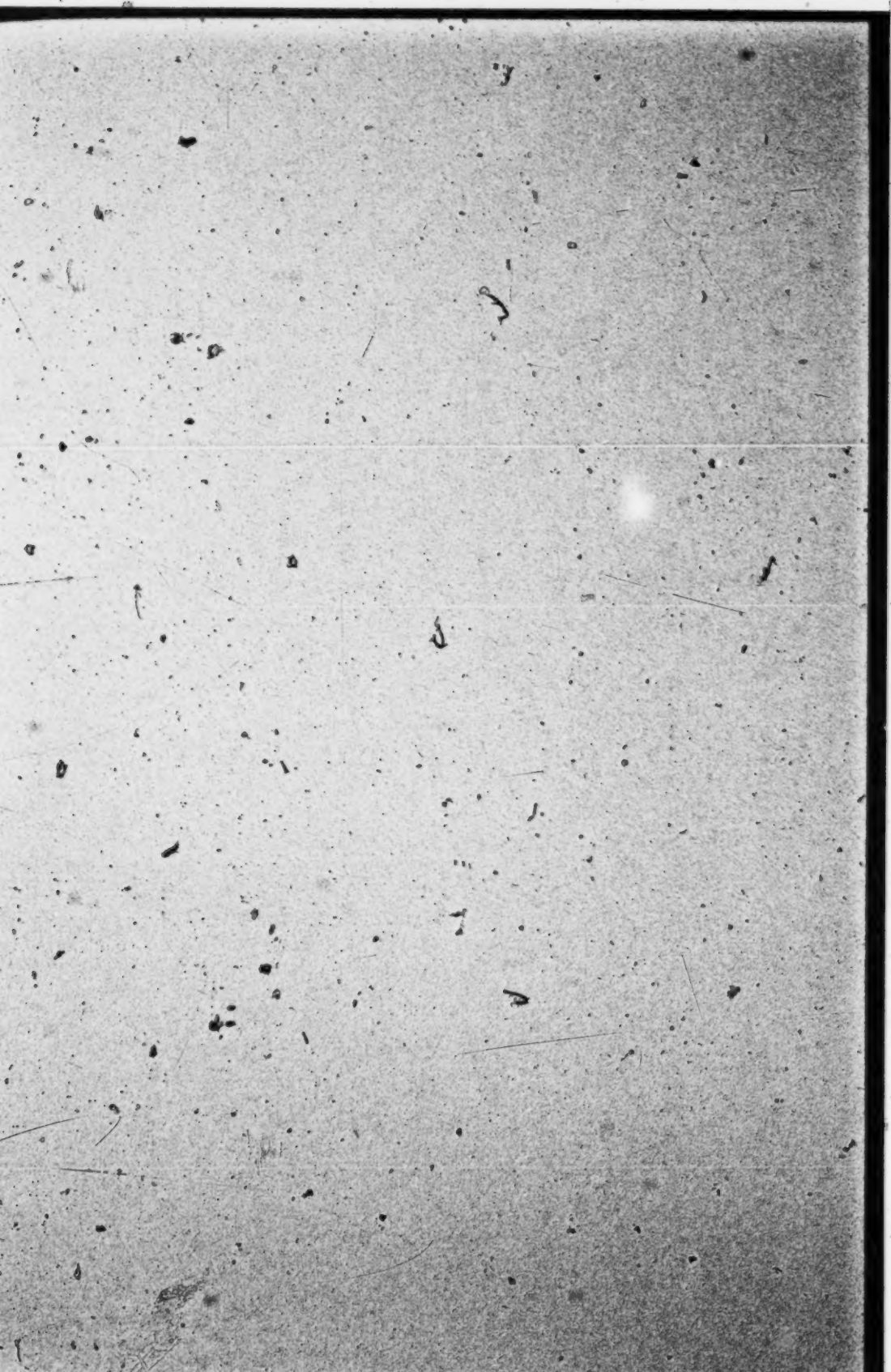
By William Kane

"Lust Web" tells of an attempt on the part of Soviet agents to secure secrets from one of our missile bases. The story begins with Grace Cromwell, whose husband has mysteriously disappeared six months before, receiving a visit from an agent from the Soviet Union. She discovers that her husband is in captivity inside Russia and that this will be used to coerce her to steal secrets from the United States Government. Grace Cromwell is sent to a special school where she is trained in the art of sexual seduction of both men and women. Upon her graduation she is assigned to both a male and female physicist at the missile base where she is employed. The novel describes her sexual experiences with both of these individuals and her ultimate decision to disclose to the United States her part in this plot. She forms an alliance with the male physicist and the story concludes with their successful capture of the Soviet spy ring and her marriage to the physicist.

"SIN SERVANT"

By Don Elliott

"Sin Servant" is the story of a young high school student who begins very early achieving sexual experience. On his graduation he goes overseas where he experiences sexual relations with both Korean and Japanese girls and upon his return to the United States settles in New York City. He becomes a gigolo and the story describes his life living with several wealthy New York dowagers and the way in which he was required to satisfy them sexually. The story ends with the gigolo marrying an old school friend and moving to a South Sea island where they presumably live happily ever after.



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No. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DAVID E. KENEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF THE COUNTY OF MONROE, NEW YORK

JOHN C. LITTLE, JR.,
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NICHOLAS P. VARLAN,
Assistant District Attorney, of Counsel.
Counsel for Respondent

April 14, 1965

Daily Record Corporation
Rochester, New York

No. 793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

DAVID E. KENEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF THE COUNTY OF MONROE, NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

About 8:00 P. M. on the 25th day of April, 1963, two female police officers entered petitioner's place of business in the City of Rochester, New York. The police officers testified that, on a previous occasion, petitioner told them of a shipment, including "hot books" or "spicy books" would be coming in (R. 8, 69); that, on the date in question, petitioner indicated to the officers the books he had previously referred to; that he said they were "hot

books", "spicy, hot" (R. 10, 11, 70, 71); that, from the books indicated, the officers chose and purchased three novels entitled "Lust School", "Lust Web" and "Sin Servant".

Petitioner testified he put the books out for sale without reading them or knowing anything about them (R. 85-86), but on cross-examination he stated that he knew generally what was in "Midnight" and "Nightstand" books (R. 92).

The stories in the three books at bar are very similar, even to the number of pages in each story, which number is 190. They are filled with graphic descriptions of immoral sexual acts and conduct, both heterosexual and homosexual. Although certain four-letter words are omitted, there can be no doubt of what is being portrayed. In each, the plot, if any, is subordinate to the theme of sexual misconduct. There is no literary merit in any of these books, and in each a somewhat "happy conclusion" is used to excuse or forgive the wantonness preceding it.

The trial jury found petitioner guilty (R. 122) of selling obscene books in violation of Section 1141 of the Penal Law of the State of New York. Petitioner was fined $500 and sentenced to a term of four months in the Monroe County Penitentiary.

Upon appeal to the Monroe County Court the conviction was affirmed. Application was made to Hon. Charles S. Desmond, Chief Judge of the Court of Appeals of the State of New York, for leave to appeal to that court, which was denied.

Argument

1. The Decision Below That the Instructions of the Trial Court to the Jury on Determination of Obscenity Fairly State the Applicable Law, When Considered in Their Entirety, are not in Direct Conflict With the Rulings of This Court or With the Decision in Volanski v. United States, 246 F. 2d 842.

In *Roth v. United States,* 354 U. S. 476, 489, this Court adopted as a standard of obscenity "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The trial judge did not direct that obscenity be determined by the appeal of the books to "sex perverted" individuals. The trial judge did say that "Obscene material is material which deals with sex in a manner appealing to the prurient interests of individuals, that is, those who may be sex perverted. . . ." (R. 108). The judge went on to describe obscene material as "the work has no other purpose except to insight and excite the interests of individuals who are already perverted to future acts of perversion." (R. 109).

The latter statement goes beyond the rule of *Roth* and is stricter, for nowhere in *Roth* is there stated any necessity to show inciting to future acts of perversion.

However, petitioner's trial counsel made a request of the trial judge in these words:

> "And I request the Court to further charge the jury that the finding of obscenity, if any, must be made on their finding from the facts in evidence; that the dominant effect of the book as a whole, has as its main purpose to stimulate sexual feelings and

> acts upon reasonable adults in the community, not young persons, or sensualists, or libertines, and that this standard must be determined not on any individual judge's or juror's standards, but on the basis of contemporary standards." (R. 121).

to which the judge replied, "In total you took some exception, but I did charge just what you are talking about." (R. 121). This response to the request to charge amounted to saying that the request was the charge of the court, thus bringing the matter within the bounds of *Roth*.

2. The Decision Below does not Raise any Significant Question as to the Constitutionally Required Degree of Scienter.

In this case the petitioner testified that he put the books in question out for sale without reading them or knowing anything about them (R. 85-86), but on cross-examination he stated that he knew generally what was in "Midnight" and "Nightstand" books (R. 92), the names "Midnight" and "Nightstand" referring to lines of books (R. 84, 90), other books of which lines he had read (R. 92).

The police officers testified that, on a previous occasion, petitioner told them a shipment, including "hot books" or "spicy books" would be coming in (R. 8, 69); that, on the date in question, petitioner indicated to the officers the books he had previously referred to and said they were "hot books", "spicy, hot" (R. 10, 11, 70, 71); that the books in question were picked from those indicated (R. 11).

It is readily apparent that the inference of knowledge was based on evidence considerably more substantial than a lurid title or a lurid cover drawing.

In *Smith v. California*, 361 U. S. 147, 154, it is said that:

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in

> proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

and, in a concurring opinion, Mr. Justice Frankfurter said, at page 164:

> "A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or in any true sense, having knowledge of the book."

Certainly the law does not contemplate that a bookseller can insulate himself by the simple expedient of avoiding reading a certain book where, as here, he admits to knowledge of lines or types of books, which include the book or books in question.

3. The Decision Below does not Raise Anew an Unresolved Constitutional Question as to "Contemporary Community Standards".

In *Roth v. United States,* 354 U. S. 476, 489, this Court adopted, as to obscenity, the test of "whether to the average person, applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest."

The word "community" is a broad term capable of many uses and meanings, for instance, "community property", "community of interest", "the world community", "the theater-going community", etc. It is apparent, then, that in each use of the word is involved something in common to two or more persons.

In "Webster's New Twentieth Century Dictionary", 2nd edition, (1960) there appears the following under "community":

"6. the people living in the same district, city, etc. under the same laws.

"7. the district, city, etc. where they live."

In Roth it is the "average person" we are concerned with, not the cosmopolite. In *Volanski v. United States*, 246 F. 2d 842, 845, is said:

> "* * * The problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury * * *, because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community."

The duty being imposed upon a jury to determine the question of obscenity, the jury will determine the question within the bounds of the understanding, experience and knowledge of its members, normally based upon the local community as is that of the average person. This will, no doubt, result in some slight variation, for not all local communities will deem the same things obscene. This is not repugnant to contemplate, for not all local statutes on the subject need be identical to be constitutional. And, if there is but one national community standard, then *Roth* need not have referred to "standards" unless it meant to encompass under one general rule the varying standards of local communities.

There are countless fields in this country where standards differ from one local community to another by reason of existing laws and customs. If they are not repugnant, why, then, should varying standards of obscenity be so considered?

The trial judge did not ask the jury to *create* rather than *reflect* the community standard when he said the jury

was to determine "the standards in which you feel this community is entitled to." It is clear from the charge that the jury was to make its determination on the basis of the existing community standard of Rochester, New York. The trial judge instructed the jury to *define* the standard, not to *create* it.

4. The Decision Below does not Raise Important Constitutional Questions as to the Proper Test of Obscenity in Literature.

The decision of the Monroe County Court held that the instructions given to the jury in this case by the trial judge "fairly state the applicable law, when considered in their entirety." The test the jury was to apply under the instructions of the trial judge was the test of standard laid down in the *Roth* case, 354 U. S. at 489.

The Monroe County Court went on to describe the books in this case as "hard-core pornography", which seems to be a standard stricter than that of the *Roth* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Monroe County Court should be denied.

Respectfully submitted,

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NICHOLAS P. VARLAN,
Assistant District Attorney, of Counsel.
Counsel for Respondent

April 14, 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 39

DAVID E. KENEY, *Petitioner,*

v.

PEOPLE OF THE STATE OF NEW YORK

On Petition for a Writ of Certiorari to the County Court of the County of Monroe, New York

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PETITIONER'S REPLY BRIEF

The Petition for a Writ of Certiorari in this case was filed on December 29, 1964. By direction of the Court, the District Attorney of Monroe County filed a Brief in Opposition dated April 14, 1965. Action on the Petition has been withheld by the Court pending the

resolution of the *Ginzburg, Mishkin* and *Fanny Hill* cases—all decided on March 21, 1966. It now becomes appropriate to reassess the instant Petition in light of those three decisions.

1. The Charge That the Obscenity of the Books Is to be Determined Solely by Their Appeal to the Prurient Interest of "Those Who May be Sex Perverted."

The first question presented by the Petition, dealing with the constitutional propriety of this aspect of the jury charge, has in no way been diluted or deprived of its appropriateness for review by anything decided in *Ginzburg, Mishkin* or *Fanny Hill*. All three decisions heeded, and indeed reinforced, the basic obscenity test enunciated in *Roth* v. *United States*, 354 U.S. 476, 489—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." And it is that test which renders constitutionally invalid that portion of the jury charge in question.

The *Mishkin* opinion, pp. 6-7, adjusted the "prurient appeal" aspect of the *Roth* test only to the extent of permitting material addressed "to a clearly defined deviant sexual group" to be tested "in terms of the sexual interests of its intended and probable recipient group." But the *Mishkin* opinion made clear that such a recipient group must "be defined with more specificity than in terms of sexually immature persons" and that there was to be no return to "the most-susceptible-person facet of the *Hicklin* test." And the recipient group in *Mishkin*, composed of those interested in such deviations as sado-masochism, fetishism and homosexuality, was found to have been defined with sufficient specificity.

But the instant case in no way involves material designed to appeal to any such sexually deviant group. The material itself bears no resemblance to that involved in *Mishkin*. There was no evidence and no claim by the prosecution that the three paper-back books involved were designed to appeal to deviant rather than normal sexual interests. There was thus no basis for these publications to be judged other than by the original *Roth* standard of their appeal to the prurient interest of "the average person."

The judge's charge that the prurient appeal was to be judged in terms of "those who may be sex perverted" or those "who are already perverted to future acts of perversion" was a bald reversion to the "most-susceptible-person facet of the *Hicklin* test." There was no attempt, as *Mishkin* requires, to define the recipient group—i.e., what the judge termed the "sex perverted"—"with more specificity than in terms of sexually immature persons." So far as the jury charge is concerned, "sex perverts" appear to be nothing more than an undefined group of sexually immature persons to whom the material in question might be appealing.

Thus the judgment below, affirming the conviction, remains in direct conflict with the *Roth* case and its definition of obscenity. And it remains in direct conflict with *Volanski* v. *United States,* 246 F. 2d 842, 844 (C.A. 6), which outlawed the testing of the obscenity of photographs by their prurient appeal to sadists, masochists and other types of sexual deviants, there being no evidence that the photographs were of a deviant nature. The obvious importance of this issue, stemming from the inconsistency of the jury charge with the *Roth* standard, continues to warrant the grant of certiorari in this case.

2. The Charge That Scienter May be Inferred From the Title, Covers and Contents of the Books.

Only the *Mishkin* opinion deals with the constitutionally required element of scienter. And it was there held that scienter was fully established in that case by virtue of "appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books." Slip opinion, pp. 9-10.

But the petitioner in this case is in a vastly different position than the appellant in *Mishkin*. This petitioner is an operator of a small magazine store who had received the books as part of a large shipment shortly before the arrest; he had not ordered the books by title, had never heard of them and had never read or discussed their contents. In short, the evidence was uncontradicted that he had no knowledge whatever of the contents of the books. Such an individual can in no way be likened to the appellant in *Mishkin*, who not only knew the contents of the books that he sold but directed and outlined their preparation and engaged in their commercial publication and distribution. While the titles and covers were among the elements of scienter mentioned in *Mishkin*, those elements appear only in the context of the vast commercial publishing enterprise personally conducted by the appellant.

The instant case thus brings into sharp focus the constitutional permissibility of permitting a jury to

ascribe scienter to a bookseller—as distinguished from a publisher or distributor—*solely* on the basis of the titles and covers and contents of the books which he offers for sale and which he has not read. Does he offer all books within his store at the peril of having some jury ascribe scienter to him based solely on the jury's view of the titles, covers and contents? Must he be compelled, if he wishes to avoid conviction, to read all the countless books that he offers for sale and adjudge their possible obscenity? What role do mere covers and titles play in determining scienter where the contents have not been read by the bookseller?

These are questions left unanswered by either *Smith* v. *California,* 361 U.S. 147, or the *Mishkin* decision. They are questions of vital concern to all booksellers in the United States, especially in view of the great emphasis now placed by this Court on "the circumstances of presentation and dissemination of material" (*Ginzburg,* p. 7) in the determination of what is obscene. They are questions that demand answers if booksellers are to know how to offer books for sale within the constitutional principles so recently laid down by this Court. Booksellers are entitled to know whether scienter is to be grounded on something more substantial than what is involved in this case and whether they must remove from sale all books with lurid titles or covers. They must know, if they are to continue safely in business, the extent to which they are accountable, in terms of scienter, for the contents of all that they offer to the public.

For these various reasons, the second question presented by the Petition remains very much alive and worthy of full consideration by this Court.

3. The Charge That the Contemporary Community Standards by Which Obscenity Was to be Determined Were Those of the Local Community and to Which the Jury Felt the Community Was Entitled.

The importance and reviewability of the question as to whether a jury should assess obscenity in the light of local as distinguished from national community standards remain unaffected by the decisions in *Ginzburg, Mishkin* and *Fanny Hill*. None of those decisions purports to discuss, let alone resolve, this recurring question. But to the extent that the *Roth* standard can now be satisfied by proof that a publication is "exploited entirely on the basis of its appeal to prurient interests" (*Ginzburg*, p. 11), it becomes all the more important whether the commercial pandering or the prurient interests are to be assessed in terms of local or national viewpoints.

4. The Question Whether the Books in Question Can Be Considered "Hard-Core Pornography."

As this Court recognized in its *Mishkin* opinion, p. 6, New York courts have interpreted "obscenity" within the meaning of § 1141 of the New York Penal Law, under which this case arose, to cover only so-called "hard-core pornography." This standard was acknowledged in *Mishkin* to be "more stringent than the *Roth* definition."

Without any evidence before it other than the three books themselves, the Monroe County Court, in affirming petitioner's conviction, found the books in question to be "hard-core pornography" or "dirt for dirt's sake." But when precisely the same type of books was before this Court in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, Mr. Justice Stewart was of the view

(378 U.S. at 214) that "the books here involved were not hard-core pornography" and that "Kansas could not by any procedure constitutionally suppress them." Mr. Justice Stewart's reiteration in *Ginzburg* (dissent, pp. 2-3) that only material properly found to be "hard-core pornography" can be constitutionally suppressed only adds to the substantiality of the question posed as to the books in question. Can this type of publication, so widely distributed today throughout the United States, properly be found to be "hard-core pornography" as that term is commonly defined? See description of such pornography quoted from the Solicitor General's brief by Mr. Justice Stewart in *Ginzburg* (dissent, p. 3, fn. 3).

Moreover, this question arises in a context where there has been no proof of commercial pandering or "exploitation of interests in titillation by pornography" (*Ginzburg*, p. 12) in the sale of these books by the petitioner. The record shows nothing more than the sale of three books by a bookseller, books with lurid covers and titles that had not been read or examined by him. For constitutional purposes, therefore, the issue as to the "hard-core pornography" nature of these books arises in the abstract, cf. *Fanny Hill*, and may properly be resolved by this Court on the record before it.

CONCLUSION

Since none of the questions presented in the Petition have been resolved or mooted by the decisions in *Ginzburg*, *Mishkin* and *Fanny Hill*, and since the Brief in Opposition has in no way detracted from the validity of the reasons why certiorari should be

granted, petitioner renews his request that the Petition be granted as to all questions presented therein.

Respectfully submitted,

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Counsel for Petitioner

March 29, 1966.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

KENEY *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, NEW YORK.

No. 2. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the County Court of Monroe County, New York, is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.